



2008-032

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

TROY KING
ATTORNEY GENERAL

January 3, 2008

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, AL 36130
(334) 242-7300
WWW.AGO.STATE.AL.US

Honorable David A. Evans, Constable
Post Office Box 190333
Mobile, Alabama 36619

ACT 2005-95 HELD UNCONSTITUTIONAL BY MOBILE CIRCUIT COURT, CV 08-901032, DATED MARCH 11, 2009.

Constables – Impeachment – Rules
and Regulations – Training Programs

The oversight of constables by the Constable Regulatory Board of Mobile ("Board"), pursuant to Act 2005-95, does not include direction of day-to-day activities. The Board may adopt rules governing the conduct of constables and suspend constables for violating the rules.

Dear Mr. Evans:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

(1) Does the "oversight" of constables by the Constable Regulatory Board of Mobile, pursuant to Act 2005-95, include direction of the day-to-day activities of constables?

(2) Does the act give the Board the authority to issue policies and procedures governing the behavior and conduct of constables?

(3) Does the Board's authority to suspend a constable found "in violation of the law" apply to all state laws, court orders, and administrative regulations, or only to violations of the act?

(4) Would a constable's failure to comply with the annual training requirements of the act

constitute grounds for impeachment under section 36-11-1(b)(1) of the Code of Alabama?

FACTS AND ANALYSIS

Act 2005-95 of the 2005 Regular Session of the Alabama Legislature provides qualifications, minimum standards, and training for constables in Mobile County and creates the Board. 2005 Ala. Acts No. 2005-95, 147. The act provides, in pertinent part, as follows:

Section 1. In Mobile County, no person shall hold the office of constable unless the person has successfully completed the minimum standards and training for peace officers pursuant to Section 36-21-46 of the Code of Alabama 1975.

Section 2. All constables shall be required to obtain a minimum of 20 hours of training per year, in addition to those requirements for constables set forth in Section 1.

Section 3. Constables not acquiring the required amount of training hours may not perform the duties of their office until the required training has been met. The Mobile County Constable Association is established to approve and provide the training of constables as required in Section 2.

Section 4. The Constable Regulatory Board of Mobile is hereby created. The board shall have *oversight* of the conduct of the constables in the county and shall resolve local complaints against the Office of Constable. The board shall have the right to suspend any constable found *in violation of the law* for a period not to exceed six months. . . . The members of the board shall provide for their own written rules of procedure. . . .

Section 5. Any constable suspended from performing the duties of his or her office under the provisions of this act is prohibited from performing any duties as a peace officer in the State

of Alabama during the term of his or her suspension and shall not be held liable for failure to perform any act required of his or her office during the term of his or her suspension.

Section 6. No constable holding office or having qualified to run for the office on the effective date of this act shall be subject to Section 1.

Id. at 148-49 (emphasis added).

Section 4 of the act provides that the Board shall have "oversight" of the conduct of and resolve complaints against constables. The act does not define the term "oversight." Webster's Third New International Dictionary defines "oversight" as "**general** supervision." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1610 (2002) (emphasis added). Therefore, it is the opinion of this Office that the Board does not have authority to direct the day-to-day activities of constables.

Section 4 further provides that the Board may adopt rules of procedure to govern its proceedings such as *Robert's Rules of Order*. The act does not, however, expressly provide that the Board is authorized to promulgate rules and regulations to carry out its oversight responsibilities. The Alabama Supreme Court has held that the statutory authority of the Statewide Health Coordinating Council to prepare the State Health Plan conferred rulemaking authority by implication. *Ex parte Traylor Nursing Home, Inc.*, 543 So. 2d 1179 (Ala. 1988).

Moreover, this Office has considered a similar issue in the context of the county health department's authority to investigate and report to the probate judge and county commission on a petition to establish a cemetery under section 22-20-4 of the Code of Alabama. Opinion to Honorable Lynda P. Feaga, Deputy Administrator, Elmore County Commission, dated November 1, 2002, A.G. No. 2003-023. The *Feaga* opinion concluded that, "[w]hile no specific authority is given to the county board of health to make regulations concerning the establishment of cemeteries, because the Legislature has authorized such an investigation, some standard guidelines or rules by which applications can be measured must be presumed." *Feaga* at 4. Consistent with these authorities, because the act authorizes the Board to oversee the constables in the county, the Board has implied rulemaking authority in that regard.

Although section 4 also grants the Board the authority to suspend constables "found in violation of the law," the act does not define "the law" that must be violated. In construction of statutes, legislative intent

may be gleaned from the language used, the reason and necessity for the act, and the purpose sought to be obtained. *Bama Budweiser of Montgomery, Inc. v. Anheuser-Busch, Inc.*, 611 So. 2d 238, 248 (Ala. 1992); *Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n of Tuscaloosa County*, 589 So. 2d 687, 689 (Ala. 1991); *Shelton v. Wright*, 439 So. 2d 55, 57 (Ala. 1983). Courts do not interpret provisions in isolation, but consider them in the context of the entire statutory scheme. *Siegelman v. Ala. Ass'n of School Boards*, 819 So. 2d 568, 582 (Ala. 2001).

There are three main components of the act, each of which is addressed in a separate section. Section 1 requires compliance with minimum standards and training for peace officers. Section 2 requires separate training for constables. Section 4 provides for the oversight of constables. The act expressly provides for a penalty for noncompliance with the first two parts. Section 1 prohibits the holding of office and section 3 prohibits the performance of duties until there is compliance with section 2. Significantly, the suspension language is not exclusively addressed in a separate section, but is included in the section having constable oversight as its primary object, immediately following the sentence providing for such oversight. Furthermore, as already addressed, that sentence providing for constable oversight also impliedly authorizes the Board to promulgate rules, and "administrative law" includes "the body of agency-made law, consisting of administrative rules, regulations. . . ." BLACK'S LAW DICTIONARY 48 (8th ed. 2004) (emphasis added). *See also, Hand v. State Dep't of Human Resources*, 548 So. 2d 171, 174 (Ala. Civ. App. 1988) ("administrative regulations have the force of law").

Therefore, it is the opinion of this Office that the suspension sentence is the penalty provision for violations of the Board's oversight authority, "the law" in the suspension sentence refers to the rules established by the Board pursuant to its authority to oversee the conduct of constables, and the Board may suspend constables in violation of those rules.

Regarding your last question, this Office has stated that it "does not issue opinions on whether a certain activity constitutes a violation of a criminal law. Only a properly empanelled jury and judge can make such a determination." Opinion to Honorable Arthur Green, Jr., District Attorney, Tenth Judicial Circuit - Bessemer Division, dated August 9, 2005, A.G. No. 2005-173 at 2; *see also*, Honorable Douglas Valeska, District Attorney, dated June 28, 1990, A.G. No. 90-00316. This Office has similarly stated that it cannot determine whether certain facts constitute grounds for impeachment of a constable. Opinion to Honorable Guy M. Sanders, Elmore County Constable, dated July 10, 2002, A.G. No. 2002-283.

Honorable David A. Evans
Page 5

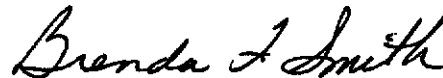
CONCLUSION

The oversight of constables by the Constable Regulatory Board of Mobile, pursuant to Act 2005-95, does not include direction of day-to-day activities. The Board may adopt rules governing the conduct of constables and suspend constables for violating the rules.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

TROY KING
Attorney General
By:

A handwritten signature in cursive script that reads "Brenda F. Smith".

BRENDA F. SMITH
Chief, Opinions Division

TK/GWB
313562/110288



ELECTRONICALLY FILED
3/11/2009 1:29 PM
CV-2008-901032.00
CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
JOJO SCHWARZAUER, CLERK

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

MOBILE COUNTY CONSTABLE
REGULATORY BOARD,

Plaintiff,

v.

FRANCES DAVID STEWART,

Defendant.

*
*
*
*
*
*
*
*
*
*

CASE NO. CV 08-901032

**ORDER ENTERING JUDGMENT ON THE PLEADINGS AND
DECLARING ACT 2005-95 UNCONSTITUTIONAL**

This matter comes before the Court on Defendant's "Motion to Dismiss or in the Alternative, Motion for Judgment on the Pleadings" and Defendant's "Motion to Strike Amended Complaint".

The Court heard oral arguments on these motions on February 13, 2009. After hearing oral arguments, reviewing the pleadings and applying Alabama Law, the Court finds as follows:

The Defendant's "Motion to Dismiss" is hereby **DENIED**.

The Defendant's "Motion to Strike Amended Complaint" is **DENIED**.

As to the Defendant's "Motion for Judgment on the Pleadings" the Court makes the following findings of fact:

1. The office of constable was established by the Alabama Legislature and is codified in Section 36-23-1 et. seq., *Code of Alabama* (1975).
2. The Alabama Code establishes duties of a constable, the number of constables, the method of vacating said office, and the manner in which

vacant offices are filled. The Alabama Code authorizes the abolition of the office of constable by local act. (See 36-23-1(b) *Code of Alabama* 1975).

3. A constable is not a "Law Enforcement Officer" as that term is defined by Section 36-21-40(4) *Code of Alabama* (1975), although this same code section lists "deputy constable" as a "Law Enforcement Officer".
4. The Alabama Peace Officers' Standards and Training Commission Section 36-21-40 *Code of Alabama* (1975) requires that an applicant for a "Law Enforcement Officer" position complete a verified application and submit it to the appointing authority. After appointment, the training and continuing education provisions of the Alabama Peace Officers' Standards and Training Commission would govern the "Law Enforcement Officer".
5. The Defendant was elected to the office of constable in 2004 and re-elected in 2008 and was duly sworn into office both years.
6. Other than the office of constable, the Defendant holds no other law enforcement related position and has not been certified by the Alabama Peace Officers' Standards and Training Commission nor has she completed any continuing education hours related to this position.
7. The Alabama Legislature adopted, by local act, Act 2005-95 which provides:

Section 1. In Mobile County, no person shall hold the office of constable unless the person has successfully completed the minimum standards and training for peace officers pursuant to Section 36-21-46 of the *Code of Alabama* 1975.

Section 2. All constables shall be required to obtain a minimum of 20 hours of training per year, in addition to those requirements for constables set forth in Section 1.

Section 3. Constables not acquiring the required amount of training hours may not perform the duties of their office until the required training has been met. The Mobile County Constable Association is established to approve and provide the training of constables as required in Section 2.

Section 4. The Constable Regulatory Board of Mobile is hereby created. The board shall have oversight of the conduct of the constables in the county and shall resolve local complaints against the office of constable. The board shall have the right to suspend any constable found in violation of the law for a period not to exceed six months. The board shall consist of three members, one of whom shall be an African-American, as follows: One board member shall be appointed by the Sheriff of Mobile County; a chief constable of the board elected by a majority vote of the members of the Mobile County Constable Association; and one member shall be appointed by the Mobile County Legislative Delegation. The members of the board shall provide for their own written rules of procedure. The members shall serve without compensation and shall serve for a period of one year. It shall be the duty of the chief constable of the board to answer to the officers of the association and the elected Sheriff of Mobile County when called upon to do so.

Section 5. Any constable suspended from performing the duties of his or her office under the provisions of this Act is prohibited from performing any duties as a peace officer in the State of Alabama during the term of his or her suspension and shall not be held liable for failure to perform any act required of him or her office during the term of his or her suspension.

Section 6. No constable holding office or having qualified to run for the office on the effective date of this Act shall be subject to Section 1.

Section 7. All laws or parts of laws which conflict with this Act are repealed.

Section 8. This Act shall become effective immediately following its passage and approval by the Governor or its otherwise becoming law.

8. The Defendant has not complied with the terms of Section 2 of Act 2005-95 in that she has not taken any continuing education courses as required by the Act. As an "incumbent constable" the Defendant is not affected by Section 1 of the Act.
9. Pursuant to the provisions of Section 6-6-227 *Code of Alabama* (1975), the Attorney General of Alabama, Troy King, was served with notice of this action and the challenge to the constitutionality of Act-105-95 and waived participation in these proceedings.

The Court finds that there is a justiciable controversy and that the Plaintiff has properly filed this action in accordance with the Alabama Declaratory Judgment Act, Section 6-6-227 *Code of Alabama* (1975).

The office of constable contains no requirements to hold office other than residing in the district for which one is elected or appointed and posting a surety bond in the amount of \$1,000.00. Section 36-2-1 *Code of Alabama* (1975) sets out other provisions to be eligible to hold the office of constable. There is no requirement in Alabama Law, other than Act 2005-95, that requires a constable to have any training, hold any certification or attend any continuing education.

Act 2005-95 is a local act which applies to Mobile County only. Article IV, Section 105 of the Constitution of Alabama of 1901, provides, in part, "No ... local law ... shall be enacted in any case which is provided for by a general law...." Section 36-21-40 et seq., *Code of Alabama* (1975) is a general law of statewide application which establishes the office of constable throughout the state. See Green v. Austin, 425 So.2d 411 (Ala.1982).

A "local law" or "local act" is defined as "a law which is not a general law or a special or private law." Ala. Const. of 1901 amend. 375. A general law is defined as "which in its terms and effect applies either to the whole state, or to one or more municipalities of the state less than the whole in a class." Ala. Const. of 1901 amend. 375.

Article IV, Section 105 Ala. Const. of 1901 provides that "[n]o special, private, or local law ... shall be enacted in any case which is provided for by a general law." This section prohibits the enactment of a local act when the subject is already subsumed by a general statute. Peddycoart v. City of Birmingham, 354 So.2d 808, 813 (Ala.1978). The subject of a local law is deemed to be subsumed in a general law if the effect of the local law is to create a variance from the provisions of the general law. Crandall v. City of Birmingham, 442 So.2d 77, 80 (Ala.1983). Opinion of the Justices No. 342, 630 So.2d 444, 446 (Ala.1994).

The Court holds that Act 2005-95 is a local act which is already subsumed by Section 36-2-1 *Code of Alabama* (1975) which clearly defines the legal requirements to be elected to and to continue to hold the office of constable. Act 2005-95 was not passed pursuant to the provisions of Article IV, Section 106 of the Alabama Constitution of 1901 (see Exhibit B to Defendant's Motion to Dismiss "Journal of the Alabama House, 2005 March 5, 2005", for which the Court also takes judicial notice).

It has been argued that the purpose of this Act is good as it requires training for those who keep the peace. In Kiel v. Purvis, 510 So 2d. 190 (1987), a case which the undersigned is very familiar with, the same argument was made. The Act in question in Kiel sought to stop electioneering and other activities that might harass voter within 600 feet of polling places in *Mobile County* only. (emphasis supplied). While the purpose of that law was commendable and arguably is needed today, the Alabama Supreme Court also ruled it to be unconstitutional

under Article IV, Section 104 and 105 of the Ala. Const. of 1901 as the general law which applied to the rest of the state only kept electioneering 30 feet from the polling place.

In as much as Alabama Act 2005-95 attempts to attach additional qualifications for election to and holding the office of constable, it is hereby declared to be unconstitutional, null and void, and of no force and effect. The Plaintiff and any others working in concert with the plaintiff are hereby permanently restrained and enjoined from attempting to enforce any provisions of this Act as it relates to this Defendant or any other person who may be holding or hereafter hold the office of constable.

DONE and ORDERED this the 11th day of March, 2009.

/s/JOSEPH S. JOHNSTON
Circuit Judge